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MONTANA FIRST JUDICIAL DISTRICT COURT  
COUNTY OF LEWIS AND CLARK

LARRY WHITE, CANDACE BERGMAN, DAVID CHASE, MICHAEL SHIELDS, KENNETH INGRAHAM, GARY ACKERMANN, and DANIEL FINLEY	No. CDV-2002-133
Plaintiffs,	<b>CLASS PLAINTIFFS' MOTION FOR ORDER OF DISMISSAL WITH CONDITIONS PURSUANT TO MRCP 41(a)(2); 23(e); AND THE STIPULATION AND ORDER OF POSTPONEMENT OF TRIAL DATED MAY 7, 2004</b>
vs.	
GOVERNOR JUDY MARTZ, ET AL.,	
Defendants.	

Pursuant to Montana Rules of Civil Procedure 41(a)(2) and 23(e), Class Plaintiffs hereby move this Court for an order dismissing the above-captioned action with certain conditions previously agreed to and ordered by this Court in the Stipulation and Order of Postponement of Trial dated May 7, 2004 (hereinafter "Stipulation and Order," a copy of which is attached hereto as Exhibit A).

1

2 **Background**

3

4 1. This lawsuit is a civil rights action on behalf of hundreds of indigent persons  
5 who rely upon the defendants to provide them with constitutionally adequate counsel (the  
6 "Action").

7 2. In March 2004, shortly before the trial date of May 17, 2004, Defendants  
8 approached Plaintiffs concerning the possibility of resolving the issues raised in the litigation  
9 through a postponement of trial. In exchange for Plaintiffs' agreement to postpone the trial,  
10 Defendants offered to advocate before the legislature for a properly funded statewide public  
11 defender system with sufficient administrative and financial resources to ensure that indigent  
12 criminal defendants receive constitutionally and statutorily adequate legal representation.

13 3. Over the following weeks, the Parties negotiated a detailed agreement setting  
14 forth the framework through which the issues in the litigation could be resolved, whether  
15 through legislation or, absent sufficient legislative reform, through adjudication. That  
16 agreement--which the Court approved and ordered, as embodied in the May 7, 2004,  
17 Stipulation and Order--sets forth the terms of the Parties' agreement governing the resolution  
18 of the instant suit under various scenarios.

19 4. Recognizing that even if legislation sufficient to address Plaintiffs' concerns  
20 were passed, affirmative steps over the following several years would be necessary to ensure  
21 the success of any newly established system, Plaintiffs sought--and Defendants agreed to--a  
22 stipulation that Defendants would be required to aggressively advocate for the continued  
23 existence and sufficient funding of a constitutionally and statutorily adequate state-wide  
24

1 public defender system for a period of not less than five years,<sup>1</sup> and that the Court would  
2 retain jurisdiction over the enforcement of the Stipulation and Order.<sup>2</sup>

3 5. Because foregoing a trial in May 2004 might have jeopardized Plaintiffs'  
4 opportunity to seek and obtain attorney's fees and costs to which they were otherwise  
5 entitled, the Parties agreed--and the Court ordered--that Plaintiffs could seek attorney's fees  
6 and costs, even if the case were resolved through legislation. Stipulation 21 further set forth  
7 the Parties' agreement that there had been "a material alteration of the legal relationship of  
8 the Parties on the ultimate issues raised by this Action with a legally enforceable change in  
9 the Parties' positions; and Defendants will not contend otherwise in any ensuing litigation  
10 over attorneys' fees and costs."

11 6. On May 7, 2004, the Parties, in an effort to resolve the alleged complaints in  
12 the Action, entered into the Stipulation and Order, to hold the Action in abeyance to permit  
13 the Montana Legislature to enact legislation during its 2005 legislative session that  
14 adequately addressed the deficiencies of the indigent defense system.

15 7. On or about April 1, 2005, during the 2005 legislative session, counsel for  
16 Plaintiffs= contacted Defendants pursuant to the terms of Stipulations 8, 10, 11 and 12 of the  
17 Stipulation and Order, which required Plaintiffs to notify Defendants of their intention to  
18 seek a trial on the issues of Defendants= liability or the adequacy of funding for indigent  
19 defense in Montana. The parties agreed to postpone further the trial date until the end of the  
20 legislative session, at which time the parties could better determine whether the final  
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22 1 Stipulation 19 provides:

23 In the event that the State enacts legislation that Plaintiffs' counsel determines to be consistent with  
24 Stipulation 1 [describing the framework of an adequate state-wide public defender system],  
25 Defendants, by and through their counsel, the Attorney General's Office, shall continue aggressively to  
26 advocate with members of the Montana State Legislature and other interested parties, including the  
27 public and all other relevant individuals, for the continued existence and funding of the legislation  
consistent with Stipulation 1 for a period of not less than five (5) years.

2 Stipulation 25 reserves the right of the Parties "to seek judicial relief from this Court in the event of a

1 provisions of Senate Bill 146 (ASB 146") would satisfy Stipulation 1 (a) through (c) of the  
2 Stipulation and Order.

3 8. On April 16, 2005, the Montana Legislature passed SB 146, An Act  
4 Establishing the Montana Public Defender Act.

5 9. On April 28, 2005, Defendant Governor Schweitzer signed SB 146 into law  
6 (the AAct@).

7 10. Upon reviewing the Act, Plaintiffs have determined that it establishes a  
8 framework for the statewide delivery of indigent defense services consistent with  
9 subparagraphs (a) and (b) of Stipulation 1 of the Stipulation and Order. However, Plaintiffs  
10 object to the level of funding estimated by the Fiscal Note to the Act, and appropriated by  
11 House Bill 2 (AHB 2@)<sup>3</sup> because it is inadequate to fund a statewide delivery of indigent  
12 defense services consistent with subparagraphs (a) and (b) of Stipulation 1 of the Stipulation  
13 and Order in the current biennium and in future biennia, and therefore inconsistent with  
14 subparagraph (c) of Stipulation 1 of the Stipulation and Order.

15 11. Both during and after the legislative session, Defendants have emphasized to  
16 Plaintiffs that, to the extent anticipated funding in HB 2 is insufficient to provide attorneys  
17 employed by or under contract with the Chief Public Defender with the resources necessary  
18 to provide constitutionally and statutorily adequate legal representation to their indigent  
19 clients, once the position is established as of January 1, 2006, the Chief Public Defender will  
20 be authorized to expend such additional funds as necessary to execute the Chief Public  
21 Defender=s responsibilities in a constitutionally and statutorily adequate manner without  
22 first seeking preapproval of the expenditures from the Legislature and that the additional  
23 funds will be reimbursed through supplemental appropriations as may be needed.

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26 breach of any of the . . . Stipulations by either Party".

27 <sup>3</sup> An Act Appropriating Money to Various State Agencies for the Biennium Ending June 30, 2007; and providing an Effective Date.

1           12.     On July 27, 2005, counsel for Plaintiffs met and conferred with Defendants.  
2     At that meeting, Plaintiffs informed Defendants that the funding allocated for the biennium  
3     was insufficient to satisfy subsection (c) of Stipulation 1 of the Stipulation and Order.  
4     Plaintiffs further informed Defendants that based upon Defendants= assertions described in  
5     paragraph 11 above, Plaintiffs would be willing to enter into a stipulated dismissal pursuant  
6     to Mont. R. Civ. P. (a)(1) and pursuant to the surviving Stipulations in the Stipulation and  
7     Order. Plaintiffs presented Defendants with a proposed stipulation of dismissal that  
8     included, among others, the provisions of Stipulation 19 of the Stipulation and Order which  
9     require Defendants to aggressively advocate for the continued existence and funding of the  
10    legislation consistent with Stipulation 1 for a period of not less than five years.

11           13.     At the meeting, and on one subsequent occasion, Defendants informed  
12    Plaintiffs that they refused to entertain a stipulated dismissal nor would they discuss the  
13    terms of the proposed stipulation or acknowledge their prior agreement to the terms of the  
14    Stipulation and Order.

15           14.     By refusing to entertain the stipulated dismissal, Plaintiffs presented  
16    Defendants now appear to repudiate certain provisions of the Stipulation and Order: first,  
17    they will no longer abide by the provisions of Stipulation 19 of this Court=s Stipulation and  
18    Order requiring them to aggressively advocate for the continued existence and funding of the  
19    legislation consistent with Stipulation 1 for a period of not less than five years; and second,  
20    they appear to repudiate the provisions of Stipulations 20, 21 and 23 to the extent that  
21    Defendants assert that Plaintiffs are not entitled to attorneys fees because of the passage of  
22    the Act.

23           15.     Plaintiffs have attempted, unsuccessfully, to resolve these issues with  
24    Defendants in good faith.  
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1           16.     Based upon: (a) Defendants= apparent refusal to abide by the provisions of  
2     Stipulations 19, 20, 21 and 23 of the Stipulation and Order; (b) Defendants= representations  
3     to Plaintiffs that the Chief Public Defender is in fact authorized to expend additional funds  
4     as described in paragraph [11] above; and (c) the provisions of Stipulation 25 of the  
5     Stipulation and Order which allow Plaintiffs to seek judicial relief from this Court in the  
6     event of a breach of the preceding Stipulations, Plaintiffs are willing to voluntarily dismiss  
7     the Action only to the extent that this Court set conditions on the dismissal that are  
8     consistent with the surviving terms of the Stipulation and Order and that otherwise permit  
9     Plaintiffs to reserve fully their rights in the Action in the event that the State fails to  
10    implement properly SB 146 or fails to provide, expend or seek sufficient funds as set forth in  
11    subparagraph (c) of Stipulation 1 of the Stipulation and Order.

12           17.     Specifically, Plaintiffs respectfully ask that this Court enter the proposed  
13    Order of Provisional Dismissal with Conditions, as attached herewith.  
14

15  
16                               Respectfully submitted, this 20th day of August, 2005.

17                               GOUGH, SHANAHAN, JOHNSON & WATERMAN

18                               by \_\_\_\_\_

19   Ronald F. Waterman  
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24   OF COUNSEL:

25   ROBIN L. DAHLBERG

26   E. VINCENT WARREN

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CERTIFICATE OF SERVICE

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I hereby certify that a copy of the within and foregoing was mailed, with  
postage fully prepaid thereon, at Helena, Montana, on the \_\_\_\_\_ day of August, 2005,  
and directed to the following:

Chris Tweeten  
Pam Bucy  
Civil Services Bureau  
Attorney General of Montana  
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